APR 30

No. 595

In the Supreme Court of the United States

October Term, 1937

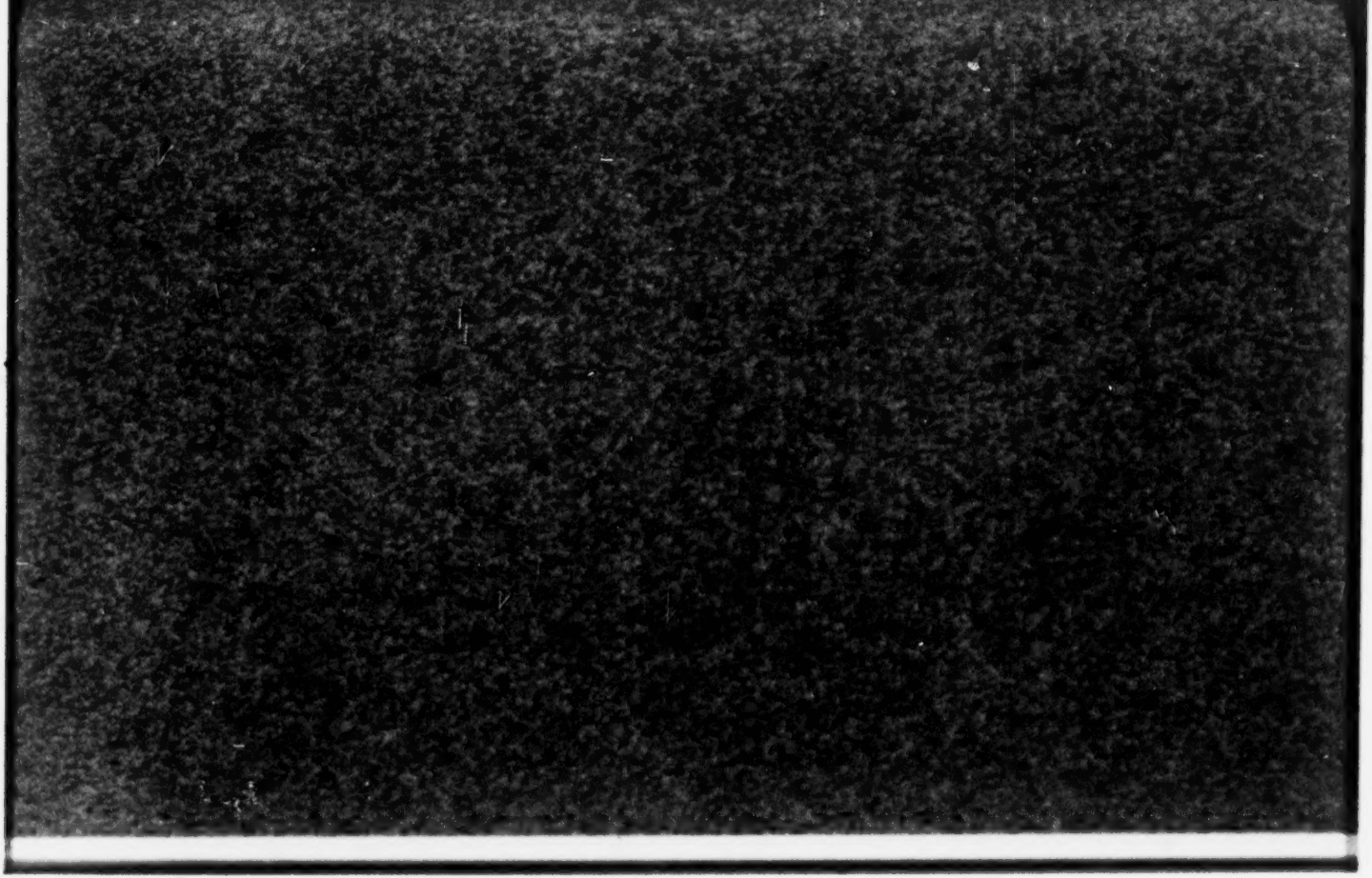
THE CHEMICAL AND FARMERS BANK OF NEW YORK, Appellant,

vs.

THE UNITED STATES,

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.



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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 596

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS, Appellants

v.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION

The opinion of the Court of Claims in this case is reported in 58 Court of Claims, 302, and appears at page 50 of the record herein.

JURISDICTION

The Act of April 11, 1916 (c. 63, 39 Stat. 47) is the Jurisdictional Act under which this suit was instituted in the Court of Claims. Such Act appears in the Findings of Fact (R. 31) and is in part as follows:

> That all claims of whatsoever nature which the Sisseton and Wahpeton bands of Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, for the amount due or claimed to be due said bands from the United States under any treaties or laws of Congress; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all claims of said bands against the United States and also any legal or equitable defense, set-off, or counterclaim which the United States may have against said Sisseton and Wahpeton bands of Sioux Indians, and to enter judgment, and in determining the amount to be entered herein the court shall deduct from any sums found due said Sisseton and Wahpeton bands of Sioux Indians any and all gratuities paid said bands or individual members thereof subsequent to March third, eighteen hundred and sixty-three: *Provided*, That in determining the amount to be entered herein, the value of the land involved shall not exceed the value of such land on March third, eighteen hundred and sixty-three * * *.

Suit was instituted in the Court of Claims on March 17, 1917, and an amended petition was filed March 26, 1920. (R. 2, 3.) On April 23, 1923, the Court of Claims made findings of fact (R. 30) and conclusions of law and entered judgment thereon dismissing the petition (R. 63, 64). On December

24, 1923, the appellants applied for an appeal to this Court, which the Court of Claims on January 14, 1924, denied for the reason that "this application was not filed within the time prescribed by the statute, section 243 of the Judicial Code." (R. 64.) Then came the Act of February 13, 1925, which abolished appeals from the Court of Claims and provided for review of its decisions by certiorari. By an Act of Congress approved March 4, 1927 (c. 522, 44 Stat., pt. 3, p. 1847), it was provided that—

> the plaintiffs or complainants in suit numbered 33731 in the Court of Claims of the United States be, and they are hereby, granted one year within which to appeal from any or all orders, judgments, or decrees rendered against them in the trial of said action heretofore had: *Provided*, That the time within which said appeal may be taken shall begin to run with the date of the approval of this Act.

On May 21, 1927, appellants filed in this Court their petition for certiorari, which was denied by this Court on October 10, 1927 (*The Sisseton and Wahpeton Bands of Sioux Indians, petitioners*, v. *The United States*, No. 261, October Term, 1927). The opposition to that petition assumed that certiorari was the proper method of review.

Meanwhile, on May 21, 1927, appellants filed in the Court of Claims an application for appeal, which was allowed on June 6, 1927 (R. 65) and on October 28, 1927 (after their petition for certiorari

had been denied) this appeal was docketed in this Court. The United States filed a motion to dismiss this appeal supported by a printed argument, decision of which was deferred until the hearing on the merits.

Since the Act of February 13, 1925, was passed, Congress has passed a number of jurisdictional Acts granting to the Court of Claims jurisdiction to hear Indian claims. In all of them it has provided that there shall be a right of "appeal"; in some, the phrase is "with right of appeal as in other cases." These are set forth in the brief on motion to dismiss. Such statutes should be construed to use the word "appeal" in a broad sense, and there is no reason to believe that Congress intended to abrogate the rule recently adopted, that review of Court of Claims decisions shall be on certiorari.

The present case is somewhat different. A right of appeal once existed, and the jurisdictional Act may be construed to revive that right in its original form. An additional argument to support this is found in the fact that this Act gave a year after its passage for appeal, whereas under the Act of February 13, 1925, certiorari must be applied for within three months, thus showing the intention of Congress to give this case peculiar treatment.

For these reasons the Act of March 4, 1927, may be distinguished from the other special jurisdictional Acts passed since February 13, 1925, and jurisdiction on appeal in this case sustained without holding that appeal, instead of certiorari, is proper in the other cases.

The motion to dismiss was made with a view to obtaining some expression from the Court which would throw light on the whole group of jurisdictional Acts, and lead possibly to additional legislation if necessary to restore the operation of the Act of February 13, 1925, in those cases remaining undecided in the Court of Claims.

We are bound to admit that the weight of the argument is with the contention that Congress intended, in this single case, to revive a right of appeal, and not to limit the claimants to certiorari. The point is submitted on this statement and the material in the motion to dismiss.

QUESTIONS PRESENTED

The amended petition filed in the Court of Claims sets forth 10 items which appellants claim they were entitled to recover from the United States. (R. 2–30.) The Court of Claims held that appellants were not entitled to recover anything. (R. 64.) In this appeal the appellants seek to review the decision of the Court of Claims as to only 4 items. (Appellants' Brief, pp. 3, 4, and 6.) While each item of claim is based upon different facts, there is one question of law controlling as to all of them. That question is whether, under the Jurisdictional Act, the Court of Claims had jurisdiction to go behind treaties and statutes and permit the appellants to recover amounts in excess of those provided for by such treaties or statutes because of some supposed mistake of fact,

inadequacy of consideration or lack of equity, or was authorized to recognize only rights accruing according to ordinary principles of law or equity under the treaties or statutes.

STATEMENT

It is believed that in this case it will aid the Court if the facts as to each of the four claims here questioned by appellants are stated separately. The able opinion of Judge Booth in the Court of Claims gives a clear picture of the controversy.

1. APPELLANTS' CLAIM FOR ADDITIONAL COMPENSATION FOR LANDS CEDED UNDER THE TREATY OF 1858

In their petition filed in the Court of Claims appellants state their claim in substance as follows (Claim 3, R. 11–16):

By a treaty of July 23, 1851, appellants agreed to cede to the Government all their lands in the State of Iowa and all of their lands in the Territory of Minnesota lying east of a line described therein. The Government agreed to pay certain money and to set apart a strip 10 miles wide on both sides of a certain designated portion of the Minnesota River, the same to be a home for said Indians. In the lands so reserved there was 1,120,000 acres, which were of the value of $1.25 per acre as of March 3, 1863. The United States Senate amended this treaty on June 23, 1852, and the same was submitted to certain of appellant bands of Indians on September 8, 1852; but of the original thirty-five In-

dians of the appellant bands authorized to act in this matter only thirteen signed said treaty as amended and none were authorized by said appellants to sign such amended treaty. Appellants therefore claim that there was no other treaty than that of 1851 affecting said 1,120,000 acres of land and that they did not consent to any sales of their lands at either 10¢ or 30¢ per acre by treaties dated June 19, 1858, as found by the Senate in the resolution of June 27, 1860. Appellants also say that they have been paid some money for said lands, but that they are not sure as to the exact amount thereof. They claim $1,400,000 (being for 1,120,000 acres of land at $1.25 per acre) less $735,097.35 (the amount they think they have been paid), leaving a balance which they claim due of $664,902.65, plus interest thereon at 5 per cent per annum from March 3, 1863.

In their brief filed on this appeal the appellants contend that the Court of Claims found that the appellants made a treaty with the United States relative to said 1,120,000 acres of land in Minnesota on June 19, 1858, and that pursuant to said treaty the Senate by resolution of June 27, 1860, declared the appellants' title to said lands to be good and valid, and that they would be allowed 30¢ per acre for the lands lying north of the Minnesota River. In said brief they claim that they owned 569,600 acres of land north of said River and that they were paid $170,880 therefor at the rate of 30¢ per acre,

and that the Court of Claims found that the value of said lands on March 3, 1863, was $1.25 per acre. Appellants, therefore, say that the $1.25 per acre must have been the value of the land on June 27, 1860, the date of the Senate resolution. (Appellants' Brief, pp. 3, 4.) Appellants, therefore, claim that the Court of Claims erred in not holding that there was a mistake upon the part of appellants and a mutual mistake between the parties to said treaty as to the value of said land, and that the Court of Claims also erred in holding that appellants were not entitled to recover the difference between 30c and $1.25 per acre (Appellants' Brief, p. 4) for said 569,600 acres, or a total of $541,120 (Appellants' Brief, p. 3). They also contend that the Jurisdictional Act under which this suit was brought meant that appellants were to be allowed payment of the value of said lands as of March 3, 1863.

The findings of the Court of Claims upon this claim may be summarized as follows:

> The Sisseton and Wahpeton and the Medawakanton and Wahpakoota Bands of the Sioux Tribe of Indians, prior to July 23, 1851, had a habitat along the upper Mississippi River, most of them living on the west side of the River, but some few of the Medawakanton and Wahpakoota Bands on the east side of the River. They were known and spoken of as the Eastern or Minnesota Sioux, and the Government designated them as "Sioux of the Mississippi" to distinguish

them from other bands of the same tribe. (R. 32.)

The Sisseton and Wahpeton Bands, by a Treaty of July 23, 1851 (10 Stat. 949), and the Medawakanton and Wahpakoota Bands by a Treaty of August 5, 1851 (10 Stat. 954), for certain considerations ceded to the United States all of their lands in the Territory of Minnesota and the State of Iowa. (R. 32.) By article 3 of each of these treaties, as originally drawn and executed, a reservation was set apart for said Indians along the Minnesota River, and the four bands were thereupon removed to their respective reservations, after which the Sissetons and Wahpetons were known as the upper bands and the Medawakantons and Wahpakootas as the lower bands. (R. 33.)

The Senate, when the proposed treaties came before it for ratification, amended them by striking out article 3, providing for the reservations on the Minnesota River, and substituting a provision that the Indians should be paid at the rate of ten cents per acre for the lands of said reservations, such payment, under each treaty, to be in lieu of the reservation originally provided for by the treaty, and to be added to the trust fund provided by the treaty for the Indians, and the President was authorized, with the assent of the Indians, to set apart for them another reservation outside of the territory ceded to the Government by the said treaties. Additional authority was also granted to the President with the consent of the Indians

to vary the conditions of the treaties. (R. 33.)

The Indians accepted the Senate Amendment, and the treaties as amended were ratified by them on September 4th and 8th, 1852 (10 Stat. 952, 958). (R. 34.)

The consideration of ten cents per acre provided for by the Senate amendment to the treaties, for the lands of the reservations on the Minnesota River originally proposed by the treaties, was paid to the bands of Indians by its inclusion in the trust funds provided by the treaties for said bands; but no tract or tracts of lands for said bands were ever set apart by the President under the provisions and authorization of the treaties as amended. The Indians continued to live on the lands of the reservations on the Minnesota River originally proposed in the treaties, and by Act of Congress approved July 31, 1854 (c. 167, 10 Stat. 315, 326), the President was authorized to confirm said reservations to said bands. No formal action under this authorization appears to have been taken by the President, but the Indians were allowed to remain on these reservations. (R. 34.)

By similar treaties of June 19, 1858 (12 Stat. 1031, 1037), between the United States and the four Indian bands it was agreed and provided that those portions of the reservations which lay on the south side of the Minnesota River should constitute reservations for said bands, and that allotments in severalty should be made to the Indians from said

lands, any remaining portions thereof to be held in common by the respective bands "as other Indian lands are held." (R. 34.) It was also provided that the questions of the titles of the Indians to the whole of said reservations, and the disposition to be made of the portions of them on the north side of the river, and the prices therefor, should be left to the United States Senate for decision. Pursuant to this provision the Senate, by resolution of June 27, 1860 (12 Stat. 1042), declared that the Indians had a just and valid right and title to the whole of said reservations, and that they should be allowed the sum of thirty cents per acre for the portions thereof lying on the north side of the river. The portion of the reservation of the Sisseton and Wahpeton Bands lying on the north side of the river consisted of 569,600 acres, for which they were paid at the rate of thirty cents per acre, or $170,880, such payment being provided for by the Act of March 2, 1861 (c. 85, 12 Stat. 221, 237). Subsequently the Sisseton and Wahpeton Indians received from the sale of the lands of their reservation lying on the south side of the Minnesota River, under the Act of March 3, 1863 (c. 119, 12 Stat. 819), the sum of $647,457.93, making a total of $930,337.93 received by them for and on account of the lands of their reservation. The entire reservation comprised 1,120,000 acres, and the value thereof on March 3, 1863, was $1.25 per acre, or a total of $1,400,000. (R. 34-35.)

In August, 1862, there was an outbreak of the Sioux Indians in Minnesota, including the Sisseton and Wahpeton Bands, during which outbreak a large number of white settlers were massacred and a great amount of property destroyed. In consequence of this outbreak Congress, by Act of February 16, 1863 (c. 37, 12 Stat. 652), abrogated and annulled all treaties between said bands of Indians and the United States so far as said treaties purported to impose any future obligation on the United States, declared all lands and rights of occupancy within the State of Minnesota and all annuities and claims theretofore accorded to said Indians to be forfeited to the United States, and provided for payment of the damages suffered by the citizens in said outbreak out of the funds in the hands of the Government belonging to said bands. (R. 35–36.)

2. APPELLANTS' CLAIM FOR COMPENSATION ARISING UNDER THE ACT OF MARCH 3, 1863 (12 STAT. 819)

This claim is stated by appellants in their petition filed in the Court of Claims in substance as follows (Claim 1, R. 4–8):

That under the Act of March 3, 1863, the President was directed to assign and set apart for the Sisseton and Wahpeton bands (appellants herein) and for the Medawakanton and Wahpakoota bands of Sioux Indians a tract of unoccupied land outside the limits of any State sufficient in extent to

enable him to assign to each member of said bands (who is willing to adopt the pursuit of agriculture) 80 acres of good agricultural lands, the same to be well adapted to agricultural purposes. They also alleged that said Act was mandatory and that the President set apart a tract for the Medawakanton and Wahpakoota bands, by an Executive Order dated July 1, 1863, but failed to comply with said Act in setting apart a tract for the appellants. It is further alleged that the tract so set aside was not intended for appellants and was only of sufficient area to provide for 1,306 members of the other two bands of Indians who had been removed to and arrived at said tract prior to said Executive Order. Appellants also claim that this land at Ushers Landing, Dakota Territory, was sandy and unfit for cultivation and the Indians who went to said tract were later removed to another tract at Niobrara, Nebraska, but that no member of appellants was located or received land either at Ushers Landing, Dakota, or Niobrara, Nebraska, and it was not intended that appellants should receive land in either of said areas as they were only of sufficient size to care for the Indians already removed who were of the other bands.

Appellants also allege in said petition that they were not given any lands under the treaty of February 19, 1867, to satisfy their claims under the Act of March 3, 1863, for the reason that the tracts set aside at Devil's Lake and the Lake Traverse Reservations

> under the treaty of 1867 already belonged to appellants and therefore could not have been given in lieu of their claim under the Act of 1863. They further allege that the agreement of September 20, 1872 (15 Stat. 505), provided nothing in lieu of their claim under the Act of 1863 since the agreement of 1872 provided for the retention or selling of lands which appellants already owned. Appellants therefore claim that on March 3, 1863, there were 4,524 members of their bands, all of whom were willing to adopt the pursuit of agriculture, and that at the rate of 80 acres for each member there should have been set aside 361,920 acres, which were of the value on March 3, 1863, of $1.25 per acre. They therefore claim they should recover $452,400 with interest at 5 per cent thereon from March 3, 1863.

In their brief on this appeal appellants contend that under the findings made by the court it is shown that no lands were actually set apart to them in accordance with the provisions of the Act of March 3, 1863, and that at such time they were entitled, upon an allowance of 80 acres for each member, to 322,080 acres of land at the price of $1.25 per acre, or the sum of $402,600. (Appellants' Brief, pp. 3 and 5.)

Upon this claim the findings made by the Court of Claims may be summarized as follows:

> In further consequence of said outbreak and of the Act of February 16, 1863, Congress, by Act of March 3, 1863 (c. 119, 12

Stat. 819), provided that the President should "assign and set apart for the said Sisseton, Wahpeton, Medawakanton, and Wahpakoota Bands of Sioux Indians a tract of unoccupied land outside the limits of any State, sufficient in extent to enable him to assign to each member of said bands (who are willing to adopt the pursuit of agriculture) eighty acres of good agricultural lands, the same to be well adapted to agricultural purposes." (R. 36.)

Pursuant to the provisions of this Act, a tract of land was shortly thereafter selected for said bands of Indians at Crow Creek on the Missouri River in Dakota Territory. At or about this time there were being held by the United States military authorities at Fort Snelling, Minnesota, as prisoners, a total of 1,601 members of the four bands of Indians, of which 1,489 were full-blood Indians and 112 half-breeds. Of the full-blood Indians 1,194 belonged to the Medawakanton and Wahpakoota Bands, and the remaining 295 to the Sisseton and Wahpeton Bands. In May, 1863, these prisoners, with a few exceptions, were removed to the tract of land selected at Crow Creek for the bands, 1,306 of them arriving there May 30th. On or about July 1st, following, a tract of land at that point was formally set apart for said Indians. (R. 36–37.)

Military operations were continued against the hostile members of said bands until the latter part of 1864, by which time most of them were driven out of the

State of Minnesota, some retreating to the west of the Missouri River and some escaping north into Canada. After the cessation of military operations against them, some of them returned eastward, and by the latter part of 1866 there were in the vicinity of Fort Wadsworth, in the eastern part of Dakota Territory, from 600 to 800 members of the Sisseton and Wahpeton Bands. An unsuccessful attempt was made by the Government to negotiate a treaty with these fragments of said bands, for the setting apart of a reservation for them and the extinguishment of their claim to lands in Dakota Territory, which claim was considered of doubtful character because said lands were also claimed by other tribes or bands of Indians. The greater part of the members of said Sisseton and Wahpeton Bands, after the cessation of military operations against them, gathered and settled in the vicinity of Fort Wadsworth, where, with the acquiescence of the Government, they remained until the Lake Traverse and Devils Lake reservations were set apart for them in 1867. It does not appear that any material number of additional members of the Sisseton and Wahpeton Bands ever went to live on the Crow Creek reservation set apart under the Act of March 3, 1863, or that any other lands were set apart for the bands under said Act; nor does it appear how many of the members of said bands were willing to adopt the pursuit of agriculture following said Act of March 3, 1863. (R. 37–38.)

By Article II of the treaty of February 19, 1867 (15 Stat. 505, 506), the Sisseton and Wahpeton Bands ceded to the United States the right to construct wagon roads, railroads, mail stations, telegraph lines and other public improvements over and across "the lands claimed by said bands," which were described, and in consideration of this cession by said bands and "of the faithful and important services said to have been rendered by the friendly bands of Sisseton and Wahpeton Sioux" represented in the making of said treaty, and "also in consideration of the confiscation of all their annuities, reservations and improvements," it was provided that there should be set apart as permanent reservations for such members of said bands as had not been sent to the Crow Creek reservation, two reservations consisting of certain portions of the lands referred to in Article II of said treaty as claimed by said bands, which became known as the Lake Traverse and the Devils Lake Reservations. (R. 39–40.)

3. APPELLANTS' CLAIM FOR COMPENSATION FOR LANDS ALLEGED TO HAVE BEEN CEDED BUT NOT PAID FOR UNDER THE TREATY OF SEPTEMBER 20, 1872

This claim is stated in appellants' petition in the Court of Claims in substance as follows (Claim 2, R. 8–11):

That under the agreement of September 20, 1872, as amended May 2, 1873, appellants ceded to the Government a tract of land estimated by the commissioners who negotiated

the agreement on behalf of the Government to contain 8,000,000 acres of land and that compensation was made by the Government to appellants on that basis; that said tract in fact contained 11,000,000 acres; that the appellants were paid for said 8,000,000 acres the sum of $800,000, or 10c per acre, which was but a small portion of the value on March 3, 1863, and the price was inadequate and the treaty unjust and inequitable; that appellants believed they were ceding only 8,000,000 acres, and they were misled by said commissioners as to the actual acreage, and they did not intend to cede more than 8,000,000 acres. They also allege in said petition that but few of the Indians whose names appear to be signed to said treaty actually signed the same; that, because of their inability to understand the English language, advantage was taken of them, and that in fact certain of said Indians were actually forced to sign said treaty. They therefore claim they should recover $1.25 per acre for 3,000,000 acres, and $1.15 per acre for 8,000,000 acres (being the difference between the 10c paid and $1.25 fair value), a total of $12,950,000, with interest thereon at 5 per cent per annum from May 2, 1873.

In their brief in this case appellants contend that under the findings of fact made by the Court there was a mutual mistake of fact as to the quantity of land ceded by the treaty of September 20, 1872, and that under the Jurisdictional Act the Court of Claims should have awarded them compensation at

the rate of 10 cents per acre for the 3,000,000 acres of land in excess of 8,000,000 acres (Appellants' Brief pp. 3 and 5), it being contended that, while the Court of Claims also found that the value of said land was not proven, that the court should have rendered judgment for the 3,000,000 acres of land at the rate of 10 cents per acre.

The findings of the Court of Claims as to this item of the claim are summarized as follows:

> By Act of June 7, 1872 (c. 325, 17 Stat. 281), the Secretary of the Interior was directed to examine and report to Congress what title or interest the Sisseton and Wahpeton Bands had to any portion of the land mentioned and particularly described in the second article of the treaty of February 19, 1867, except such rights as were secured to them by the third and fourth articles of said treaty setting apart the Lake Traverse and Devils Lake reservations for them, and also to examine and report "whether any, and if any, what, compensation ought, in justice and equity, to be made to said bands of Indians respectively, for the extinguishment of whatever title they may have to said lands." The Secretary appointed a commission to make a full investigation of the Indian title, and if it found such title to be valid and complete, to negotiate for the relinquishment of the same upon terms at once favorable to the Government and just to the Indians. On October 3, 1872, the commission, after investigation, reported that prior to the Treaty of February 19, 1867, the title of the

Sisseton and Wahpeton Bands to the tract of land in question was doubtful, owing to the fact that up to some time prior to that treaty other bands of Sioux Indians claimed a common interest in the lands, but that the United States had by that treaty recognized the Indian title to this tract of land as being in the Sisseton and Wahpeton Indians, and was thereby estopped from later denying their title to it. The commission reported that it estimated the tract of land to have an area of over eight million acres, and that the value of the right and title of the plaintiff bands therein ought to be fixed at the sum of $800,000, though the Indians urged $200,000 more than this sum, and one of the commissioners was of the opinion that $800,000 was more than ought to be allowed under the circumstances. (R. 41.)

With its report the commission submitted a proposed treaty which they had negotiated with the said Indians under date of September 20, 1872 (Kappler's Indian Laws and Treaties, Vol. 2, page 1057), under the terms of which said bands were to "cede, sell, and relinquish to the United States all their right, title, and interest in and to" the tract of land in question, "as well as all lands in the Territory of Dakota to which they have title or interest," except the said Lake Traverse and Devils Lake reservations set apart by the Treaty of February 19, 1867. The principal, but not the only, consideration was to be $800,000, payable in annual installments of $80,000 each, without interest.

This agreement, or proposed treaty, was submitted to Congress and by Act of February 14, 1873 (c. 138, 17 Stat. 437, 456), Congress confirmed merely the portion of it providing for the cession of the lands and the consideration of $800,000, and the method of its payment, and appropriated for the payment of the first $80,000 installment. The agreement as thus amended and confirmed by Congress was ratified by the Indians on May 2, 1873 (Kappler's Indian Laws and Treaties, Vol. 2, page 1059), and Congress thereafter annually appropriated for the remainder of the annual installments due the Indians under the agreement, it being specified in the Appropriation Acts that the sum appropriated was the current installment of the amount provided by said agreement "for the relinquishment by said Indians of their claim to or interest in the lands described in the second article of the treaty made with them February nineteen, eighteen hundred and sixty-seven." 18 Stat. 167, 441; 19 Stat. 192, 287; 20 Stat. 81, 310; 21 Stat. 127, 497; 22 Stat. 81. (R. 42.)

In the making of the agreement of September 20, 1872, it was the understanding and belief of the parties thereto that the approximate area of the tract of land to be sold and ceded by the Indians under the agreement was eight million acres, whereas the actual area of said land was eleven million acres, or approximately three million acres more than was believed to constitute its area.

The Court of Claims found that the value of the land either at the time of the making of the agreement or on March 3, 1863, was not satisfactorily shown by the evidence. (R. 42–43.)

4. APPELLANTS' CLAIM FOR PAYMENT OF THE PRINCIPAL OF THE TRUST FUND CREATED UNDER THE TREATY OF JULY 23, 1851

In the petition filed in the Court of Claims this claim is stated substantially as follows (Claim 4, R. 16–18):

> That the treaty of July 23, 1851, provided that $1,360,000 (which was part of the money consideration for the cession by appellants for certain lands) (R. 13) should remain in trust with the United States and 5 per cent interest thereon should be paid annually to appellants for the period of fifty years commencing July 1, 1852, which should be in full payment of said balance, principal, and interest (R. 13); that when said treaty was made appellants did not understand, nor in fact knowingly agree, that the fifty annual interest payments should be in full payment for both principal and interest, but understood that the principal was to remain in trust and to be paid to the Indians at the end of the 50-year period; that the treaty was unconscionable and unfair and that the Court of Claims has the right under the Jurisdictional Act to consider the unfairness in equity and unconscionableness of said treaty.

> Appellants further allege that the treaty as drawn was confusing and that the farmers drew said treaty in such form in order to confuse them and to defeat them in their rights and that in equity and good conscience appellants should recover said sum of $1,360,000 with interest thereon at 5 per cent per annum from July 1, 1901, the date when the principal became due.

In their brief in this case appellants contend that in view of the findings made by the Court of Claims such court erred in failing to hold that the appellants were at the time of making their treaty mistaken as to their rights under the law. (Appellants' brief, pp. 4 and 5.)

The findings made by the Court of Claims upon this item are in substance as follows:

> The Treaty of July 23, 1851, provided for the creation of a trust fund from the funds provided to be paid to the Sisseton and Wahpeton Bands for their cession of lands to the Government under the treaty, this trust fund to be held by the Government and five per cent interest thereon paid annually to the Indians for a period of fifty years, and the payment of this interest was to be in full payment of and to extinguish the trust fund. Under the treaty as submitted to the Senate for ratification the amount of this trust fund would have been $1,360,000, but under the treaty as amended by the Senate and adopted by the parties thereto it was increased to

$1,472,000. Prior to the outbreak of 1862 and the Act of February 16, 1863, annulling all treaties between the Government and the Sisseton and Wahpeton Indians, and forfeiting all annuities and claims theretofore accorded the Indians, the Government had accounted to the Indians for the interest on the trust fund, and notwithstanding the forfeiture of their rights by the Act of February 16, 1863, the Government has, under subsequent Acts of Congress, also accounted to the Indians for the interest on the trust fund for the remainder of the fifty-year period, less the amounts paid to citizens for damages sustained by them by reason of the outbreak. No payment has been made by the Government to the Sisseton and Wahpeton Indians for or on account of the principal of the trust fund. (R. 38.)

The Court of Claims found that some of the members of the Sisseton and Wahpeton Bands did not understand, at the time of the making of the Treaty of July 23, 1851, that the payment of interest on the trust fund for fifty years was to be in full payment of the principal thereof, but understood that at the end of the fifty-year period the principal was to be paid to the Indians, but further found that it did not appear that the provision of the treaty on this point was misunderstood by the chiefs and headmen who represented the Indians in the making of the treaty. (R. 38–39.)

SUMMARY OF ARGUMENT

The Jurisdictional Act allows the Court of Claims to award judgment only for amounts due "under any treaties or laws of Congress." No treaty may be disregarded or set aside because of alleged mistake, or inadequacy of consideration, or lack of fair dealing.

All four claims now urged are based on the theory that the Jurisdictional Act in some way broadened the appellants' rights or created new rights. The Jurisdictional Act merely provided a remedy for existing rights created by prior treaties or statutes.

The findings show that the appellants have heretofore received all to which existing treaties or statutes entitled them.

In the first item here urged by appellants, they claimed in the petition filed in the Court of Claims the value of certain lands which, they say, were allotted to them by the treaty of 1851. The Court of Claims has found that by valid amendments the allotment was changed and by subsequent treaties the questions of title, disposition, and price of the lands involved were left to the Senate for determination. The Senate has acted and the amount fixed by it has been paid. The appellants now attempt to base their claim upon an alleged mistake as to such price because the Senate fixed the value as thirty cents per acre in 1860 and the Court of Claims has found the value in 1863 to be $1.25 per acre. The United States contends there was no

mistake. The power to decide was conferred without restriction upon the Senate. It has acted, and its action, being in no manner impeached, must stand.

In the second item here in question a claim is made for the value of lands which appellants say the statutes required the President to set aside for them, but which were never so set aside. Although Congress authorized the President to set aside lands for those Indians who were willing to adopt the pursuit of agriculture, and the area so set aside was not sufficient to allot eighty acres to each member of appellant tribes, no liability results upon the United States, because it was not shown how many Indians were willing to adopt the pursuit of agriculture, and it appears that all who applied for allotments were cared for, and that those who did not go to the Crow Creek Reservation had other provision made for them later. The facts found by the Court of Claims with reference to the insurrection then being waged by these Indians and the necessity of extended military operations against them and the conditions attending such situation further negative any liability upon the United States because of any failure to make allotments at that time.

In the third item appellants claimed that they ceded certain lands to the United States at ten cents per acre, which lands were represented to and believed by them to contain only 8,000,000 acres;

that in fact there were 11,000,000 acres, and that this treaty was not really signed by many whose names appear upon it; that some were forced to sign, and advantage was taken of them, and they were misled by representatives of the United States as to the acreage. They claimed an addition to the money already paid for the 8,000,000 acres and the full value of the 3,000,000 acres. The findings of fact contain nothing to sustain the alleged misrepresentation, coercion, or improper conduct. Appellants now claim a mutual mistake as to the acreage and that they should recover ten cents per acre for the 3,000,000 acres, although they failed to prove the value of the lands. This claim is not one under the treaty, but contrary to it. The transaction involved was not a sale of land by the acre, but was a release by appellants for a lump sum of their rights in certain designated areas described by metes and bounds, the acreage of which was unknown, and an error in the mind of one or both of the parties as to the approximate number of acres involved would not permit appellants to recover here.

The fourth item involves a trust fund created by the treaty of 1851. The treaty provided that payment of interest thereon at five per cent per annum for fifty years should be in full payment of and extinguish the principal. Such interest has been paid. The appellants claimed in their petition that the treaty was confusing and was drawn with the intent to confuse; that it was unconscion-

able, and they did not understand it; and that, therefore, they should have a judgment for the principal. The Court of Claims has found no unfair dealing upon the part of the United States, but has found that the duly authorized representatives of appellants, who negotiated the treaty, fully understood it, although some members of the tribe did not. Aside from this, the treaty can not be changed or set aside by the courts under this Jurisdictional Act.

ARGUMENT

I

CLAIM FOR ADDITIONAL COMPENSATION FOR LAND CEDED UNDER THE TREATY OF 1858

The findings of fact made by the Court of Claims clearly refute the allegations made in the petition filed in the Court of Claims. They clearly show that appellants' claim that the amendments to the Treaty of 1851 were never assented to by the appellants is incorrect. The Court of Claims specifically finds that they were ratified. (R. 34.) The findings further refute appellants' contentions that they never made any agreement concerning these lands by treaty in 1858. The Court of Claims finds as a fact that by the Treaty of 1858 the disposition as well as the sum to be allowed for the lands on the north side of the Minnesota River was left to the determination of the Senate (R. 34), and that the Senate, acting pursuant to such au-

rangement determined that the land should go to the United States and the sum that should be allowed therefor, and such sum has been paid. (R. 35.) These facts seem to clearly bar any recovery on the basis alleged in the petition.

Appellants in their brief in this Court have changed their contention, and now claim that since the Court of Claims has found that the value of these lands on March 3, 1863, was $1.25 per acre, that this conclusively shows that there was a mistake upon the part of appellants and a mutual mistake between the parties to the Treaty of 1858, and that the value of the land at the date of action by the Senate in 1860 must have been $1.25 per acre and not 30c, the amount fixed by the Senate as the price to be paid by the United States.

In the first place, the Senate was not necessarily required to find the value of the lands under the treaty, but it was to determine the question of title of the lands, what disposition should be made thereof, and what sum should be allowed therefor. The Senate determined under all the circumstances appellants should be allowed 30 cents per acre. That was not necessarily a determination of the value. Further than that, it is altogether possible that the lands may have been of the value of 30 cents per acre in 1860 and $1.25 in 1863. These two facts are not necessarily and in all events inconsistent. But regardless of these matters, there is no occasion for the application of the doctrine of mu-

tual mistake, much less any theory of unilateral mistake. There were no representations on either side of values; there were no agreements of sale or price; but there was an express agreement, which has not been impeached, that the question of title, the disposition and the amount of the allowance should be determined by the Senate. The appellants agreed to this, and the Senate acted upon it. The amount was so determined, and has been paid. There is no reason or excuse for going back of such determination. Even if the Senate fixed the amount at only a small fraction of the actual value, such fact would not avoid the agreement. Under the agreement made by the appellants, the Senate might have fixed any sum which it saw fit. It did not agree to make such amount dependent upon the value. In leaving such authority and power to the Senate there is nothing in the findings to show that the Indians were in any manner imposed upon, treated unfairly or mistaken. There is also nothing in the findings showing that the Senate exercised this authority in bad faith or in such an arbitrary manner as to indicate bad faith. In these circumstances, the finding and action by the Senate have in nowise been impeached and must stand.

It might also be added that by the Act of February 16, 1863, Congress abrogated all treaties with appellants so far as such treaties purported to impose any further obligation upon the United States and forfeited all lands and rights of occupancy

within the State of Minnesota. (R. 35, 36.) There is no showing that the rights here claimed, even if they ever existed, were in any way subsequently restored. Other provisions were later made for the appellants.

II

CLAIM FOR COMPENSATION ARISING UNDER THE ACT OF MARCH 3, 1863

The Court of Claims found that in August, 1862, there was an outbreak of the Sioux Indians, including the appellants, in which many white people were massacred and a great amount of property destroyed. In consequence of this, Congress on February 16, 1863 (c. 37, 12 Stat. 652), abrogated and annulled all treaties with appellants and by an Act of March 3, 1863 (c. 119, 12 Stat. 819), provided that the President should set aside a tract of land sufficient to enable him to assign to each member of said bands who was willing to adopt the pursuit of agriculture 80 acres of good land. Pursuant to the Act there was selected for the four bands a tract at Crow Creek in the Dakota Territory. The prisoners held at Fort Snelling of these four bands of Indians totaled 1,601, of which number 295 belonged to the appellant bands, and 1,306 of these prisoners were removed to the new reservation. Military operations continued against the hostile members of the bands until 1864, and most of them were driven from Minnesota into the far west, some escaping into Canada. Some time later,

about 600 to 800 of them gathered (in 1866) in the vicinity of Fort Wadsworth. Attempts to make treaties with them proved unsuccessful for a time, and they remained there until the Lake Traverse and Devil's Lake Reservations were set aside for them in 1867. (R. 36, 37.)

Upon this statement of facts, regardless of whether the Act of 1863, concerning the setting aside of a reservation, was mandatory or otherwise, the conclusion by the Court of Claims and its reasons therefor are sound. The Court of Claims, in its opinion, very well states that (R. 54)—

> In the face of the record it is difficult to comprehend an insistence that the President was remiss in not setting apart 361,928 acres of land in 1863 for the Sisseton and Wahpetons, when these Indians at the time were fleeing from capture, openly hostile to the Government, and being closely and continuously pursued by the Army of the United States.

The court points out that such an obligation as that contended for would be an "unique obligation," and that such Act was obviously intended to remove these undesirable Indians from Minnesota, and in express terms allotted only to those individuals willing to adopt the pursuit of agriculture, hoping thereby to civilize them. As the court further says, it is inconceivable that Congress intended to do more than to provide for Indians in amity with the Government and respect for the laws,

while the major portion of these Indians were scattered and fleeing as rapidly as possible from the range of military activities. The court then points out that none of those for whom claim is now made appeared to have applied for enrollment at the Crow Creek Reservation, and those in amity who did were cared for. The court further finds as a fact that it does not appear how many were willing to adopt the pursuit of agriculture as required by said Act of 1863. (R. 38.)

By the treaty of 1867, Congress specifically made other provisions for those who had not been sent to the Crow Creek Reservation. The court then points out that the President could not accomplish the impossible, and that he was charged by law with providing for an existing and contemporaneous condition of affairs; that it would have been absurd to set aside a vast and extensive area when by no possible process of reasoning could he apprehend to what extent it would be taken up by the Indians, who had at least for the time expatriated themselves. The court concludes that the Act of 1863 was no more than a conditional grant.

The above reasoning of the Court of Claims is so logical and sound that nothing further need be said to sustain the conclusion which it reached that upon this item appellants could not recover.

III

CLAIM FOR COMPENSATION FOR LANDS ALLEGED TO HAVE BEEN CEDED BUT NOT PAID FOR UNDER THE TREATY OF SEPTEMBER 20, 1872

It will be noted that appellants in their petition in the Court of Claims rested their case upon the statement that the appellants believed that they were ceding only 8,000,000 acres of land, but they were misled by the Commissioners who negotiated the treaty as to the actual acreage, and that they did not intend to cede more than 8,000,000 acres. They also charged that but few of the Indians whose names appear on the treaty actually signed the same, and because of their inability to understand English advantage was taken of them, and some were actualy forced to sign. The findings of the Court of Claims fail to sustain any of these charges of improper conduct. These findings show that a commission was appointed to investigate the appellants' title to these lands and if title was found to be valid to negotiate for the relinquishment of same. The Commission investigated and negotiated a treaty; the treaty was presented to the Senate and there amended, and then ratified by the Indians on May 2, 1873. (R. 41, 42.) In all of this there is not word to show that any advantage was taken of the Indians. The Court of Claims did find that in making the agreement it was the understanding and belief of the parties that the approximate amount of land involved was 8,000,000

acres. (R. 42.) In this situation, the appellants in their brief contend that this shows a mutual mistake and therefore the Indians should recover. The Court of Claims specifically found that the value of the lands was not shown by the evidence (R. 43). In their brief appellants contend that court should assume the value of 10c an acre and award judgment for the Indians in that amount.

The transaction here involved was not a sale of land by the acre; the findings show that the Act of 1872 provided that the commission was to investigate the title and if necessary to negotiate a treaty concerning the disposition of lands mentioned and described in the second article of the Treaty of February 19, 1867. (R. 41.) This portion of the Treaty of 1867 described the land as beginning at a certain point and running along certain rivers or other designated lines until an area had been fully and completely described and designated. No mention whatsoever of acreage is made in such description. (R. 40.) The commission then estimated that the tract contained 8,000,000 acres, and the value of the right and title of appellants ought to be fixed at the sum of $800,000. There had been considerable question as to the right and title. It also appeared that some of the Indians claimed $200,000 more while one of the Commissioners felt that the sum should be less (R. 41), and the treaty as finally presented to the Senate provided that the Indians would cede, sell, and relinquish their right and title

in and to this tract "as well as all lands in the territory of the Dakota to which they may have title or interest" with certain exceptions therein named. It can not be said that in such a transfer as this, in which the property is described by metes and bounds and not by acres and in which they not only sell the area within the lines described but also include all of their lands in the territory of Dakota, that there was a sale in which either party had in mind any given number of acres. It was a sale by lot and not by acre. The price was, no doubt, fixed with a view to the entire territory comprehended within the metes and bounds designated, and not with a view to the number of acres designated. The mere fact that the total price fixed was at the rate of 10c per acre has but little significance when the Government had previously paid these Indians for other lands at the rate of 30c per acre, although some earlier sales were at the rate of 10c per acre.

There is no room in such a situation to say that a valid agreement properly made should be set aside upon the ground of a mutual mistake. Even though the parties may have thought that there were only 8,000,000 acres within the territory described by metes and bounds, it is evident that in dealing with such a vast area of more or less unsurveyed and undeveloped land that but little could be accomplished in the estimate of the number of acres involved, and that when the transaction was negotiated and

consummated that the matter paramount in the minds of both parties was that they were selling and buying an area bounded by rivers, lakes, mountains, or State lines and not a specific number of acres.

These facts considered in connection with the general release of all of the Indians' rights to land in the territory of Dakota conclusively show that the acreage was not the "yardstick" of the price. One side was willing to wipe out its claims to the whole tract described and anything further in the territory of Dakota for the price named; the other side felt that to thus clean up the situation was worth the sum fixed. The mere fact that both parties thought that there were about 8,000,000 acres of land in the territory specifically described by metes and bounds can in no way impair the transaction.

IV

CLAIM FOR PAYMENT OF THE PRINCIPAL OF THE TRUST FUND CREATED UNDER THE TREATY OF JULY 23, 1851

In their petition, filed in the Court of Claims, appellants contend that they did not understand or agree that the interest payments would extinguish all obligation to pay the principal, and that the treaty was confusing and was drawn up by the representatives of the Government for the purpose of confusing appellants. The Court of Claims found that some of the members of the appellant bands did not understand that the payment of interest would extinguish the principal, but that it did not appear that the provision on this point was misun-

derstood by the chiefs and headmen who represented the Indians in making the treaties. (R. 38, 39.)

Of course, the Government could deal only with the representatives of the Indians. No doubt there are many citizens of the United States who do not understand all of the treaties made by the duly authorized treaty-making power of the United States, but that would not affect the validity of any treaty so made. In this case the findings of the Court of Claims show that the authorized representatives of appellants with whom the Government dealt fully understood the treaty and therefore the validity of such agreement can not be successfully attacked. In their brief in this case, appellants have attempted to broaden their contention into an argument that since the treaty is not clear and the United States was dealing with an inferior race and the treaty works an unconscionable result, the court should grant relief. There is nothing in the findings to show that the treaty is unfair. Those charged with the duty of negotiating it understood the treaty as made. The courts have no authority to make new treaties for the parties; there is nothing impeaching the validity of this treaty.

V

THE JURISDICTIONAL ACT DOES NOT ENLARGE THE APPELLANTS' SUBSTANTIVE RIGHTS

There is very little in appellants' briefs to the effect that they have any legal rights in these mat-

ters. There is only a semblance of argument that they have any equitable rights such as would be enforced in a court of equity. Most of their contentions may be summarized into the statement that to give force and effect to the treaties as made would be unfair and work an unjust result upon the Indians; that because of such situation there is a moral obligation upon the Government, acting through the courts, to grant relief. As an excuse for this theory they seem to contend that the Jurisdictional Act in some way increased, enlarged, or broadened their substantive rights. There is nothing in the Jurisdictional Act enlarging the substantive rights of the parties. That Act merely affords a remedy for the determination of their rights "under any treaties or laws of Congress." To set aside a treaty or any of its provisions is not to enforce a right under it.

This Court, construing Jurisdictional Acts similar to the statutes here involved, has settled that such Acts make no change in substantive rights but merely afford a procedure for the enforcement of whatever substantive rights may otherwise exist.

In the case of *United States* v. *Old Settlers*, 148 U. S. 427, 468, 469, the Court, speaking through Mr. Chief Justice Fuller, said:

> • • • Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Con-

> gress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference.
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> * * * * *
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> The settlement of a controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto, and the determination of what sum, if any, might be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties or laws, or holding them inoperative on the ground alleged.
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> The Court of Claims was indeed to have "unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of the said Indians may be fully considered and determined." But this did not mean that either party was entitled to have or receive by virtue of the act anything more than each was entitled to under existing stipulations, or to bring supposed moral obligations into play for the disposal of the case. The inquiry was not to be technically limited by rules of procedure, or restrained by the distinctions between law and equity * * *.

In the case of *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500, Mr. Justice Van Devanter, who delivered the opinion of the Court, said:

The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. *United States* v. *Old Settlers*, 148 U. S. 427, 469; *United States* v. *Choctaw &c. Nations*, 179 U. S. 494, 535; *Sac and Fox Indians*, 220 U. S. 481, 489.

CONCLUSION

For the reasons heretofore set forth, it is respectfully submitted that the judgment of the Court of Claims is correct and should be affirmed.

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APRIL, 1928.

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